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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents Bert and Carol Vorchheimer, guardians *ad litem,* on her own behalf and on behalf of all others similarly situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE N.O.W. LEGAL DEFENSE AND EDUCATION FUND

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The undersigned, as counsel for the American Jewish Committee and the N.O.W. Legal Defense and Education Fund, respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Interest of the *Amici*

The American Jewish Committee was founded in 1906 and is concerned with the preservation of the security and constitutional rights of Jews in America through preservation of the rights of all Americans. The Committee believes that the welfare of Jews in the United States is inseparably

related to the extension of equal opportunity for all, necessitating equal protection of the law for women, as well as for members of minority groups. The Committee has filed briefs in numerous cases involving equal educational opportunity for minority students, including *Brown* v. *Board of Education,* 347 U.S. 483 (1953), *Keyes* v. *School District,* 413 U.S. 189 (1973) and *Lau* v. *Nichols,* 414 U.S. 563 (1974)

The N.O.W. Legal Defense and Education Fund is a non-profit, civil rights organization, organized in 1971, which exists to eliminate discrimination and secure equal rights for all women.

Discrimination in public education which is sex-based is, in the view of the Committee, a primary wrong to the person excluded, as well as a potential threat to members of either sex. Accordingly, the *amici* are deeply concerned with the issues and outcome of this case.

We believe that this case presents important issues concerning the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In challenging the constitutionality of the action and policy of the Philadelphia School District which bars access of academically-qualified female students to Philadelphia's most renowned and scholastically distinguished secondary school, this case raises issues concerning the applicablity of the Equal Protection Clause to members of the female sex.

The accompanying *amici curiae* brief, based upon our growing concern and experience in matters involving sex-based discrimination, is offered in the hope that it will make

a modest contribution to the resolution of the issues before this Court.

We have sought the consent of the parties to the filing of a brief *amici curiae.* Counsel for the petitioners granted consent. Counsel for the respondents withheld consent. Therefore, pursuant to Rule 42 of the Revised Rules of this Court, we move for leave to file our brief *amici curiae,* which is conditionally attached hereto.

We regret the short delay in the submission of this brief, occasioned solely by the necessity of the process involved in procuring the approval of our governing bodies.

December, 1976

Respectfully submitted,

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the order denying rehearing *en banc* is not yet reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Statement of the Case

Petitioner, secondary school student Susan Vorchheimer, commenced this class action to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to Central High School, Philadelphia's most renowned scholastically-oriented secondary school.

At both the junior and senior high school levels, Philadelphia maintains "academic" schools for scholastically superior students. Susan Vorchheimer attended Masterson School, a coeducational academic junior high school. Upon graduation in June, 1974, she was designated most outstanding student and received several other awards, including the awards in science and geometry. Despite her conceded academic qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex.

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High, which is reserved for females. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from

the entire city; all other schools operate mainly on a neighborhood basis. Most Philadelphia high schools are substantially overcrowded; enrollment at Central and Girls is under capacity.

It is undisputed that Central's scientific facilities are superior to those of Girls High.

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma maters. Central is the only high school in Philadelphia with a substantial private endowment.

Based on these findings, the district court held that Central's exclusionary policy adversely affects Susan Vorchheimer and the class she represents by denying them the opportunity to attend a coeducational, academically superior public high school, a school with an unequaled history and national reputation. Concluding that the arrangement denied females the equal protection of the laws, the court enjoined the Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any other member of the class she represents to Central High School solely on the basis of her sex."

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"),

the Court of Appeals for the Third Circuit reversed the court below in a 2-1 decision. The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." Further, it noted that "in the scientific field * * * Central's [academic facilities] are superior." Nevertheless, the majority held that Susan Vorchheimer and those she represents are not denied the equal protection of the laws by their exclusion from Central High School.

On October 18, 1976, this Court granted the petition for *certiorari*.

Question to Which This Brief Is Addressed

Does the action of the Philadelphia School District deny academically-qualified female students the equal protection of the laws by barring their access to Philadelphia's most renowned scholastically-oriented secondary school solely on the basis of sex, without providing a coeducational secondary school which is truly equal to that school?

ARGUMENT

I

Outstanding academic students in the Philadelphia School District should be furnished the option of attending a coeducational, academic public high school.

A. The failure of respondent school district to furnish outstanding academic students with the option to attend a coeducational public high school, while average students are furnished with this option, constitutes a denial of Equal Protection guaranteed by the Fourteenth Amendment.

Respondent school district offers academic, comprehensive, technical and "magnet" types of high schools. Among the comprehensive high schools, which are aimed at the average student, "most * * * are co-ed." 532 F.2d 880, at 881. That is, average high school students in the Philadelphia School District are furnished the option of attending schools geared to their needs which are coeducational, as well as those few which are restricted on the basis of gender.

As regards the district's two academic high schools, however, the situation differs markedly. These schools, which offer the only college preparatory courses and are attended solely by outstanding students, restrict their admission on the basis of sex: Central High School is restricted to males, and Girls High School to females. For the outstanding public high school student in Philadelphia there is no choice but to attend a single-sex school.

The court below [at 882] states that "[t]he local school district has chosen to make available on a voluntary basis

the time-honored educational alternative of sexually-segregated schools." This statement at once implies (1) that the norm of high school education is coeducation, and (2) that all high school students in the district are provided with the alternative to attend either coeducational or single-sex schools. As to the first point above, we agree that coeducation is the norm, and document this in point B, *infra.*

With reference to the second point, it is an undisputed fact that outstanding academic students cannot choose to attend a coeducational public high school, which is limited to outstanding students, since attendance at the academic high schools is restricted on the basis of sex. It is inaccurate to term the availability of these two high schools an "educational alternative." Quite the contrary: since there is no coeducational school available within the district for outsanding academic students, the two high schools in this case offer no "educational alternative" at all for such students. They must attend either Girls or Central, depending entirely on their sex. "Since a female (or male) student who wishes to attend an academic high school can only attend a single-sex institution, defendant does not provide alternatives at this level." 400 F.Supp. 326, at 333.

The essence of "equal protection" is that persons similarly situated must be treated similarly by the state. In the present case, college-bound youngsters seeking to attend coeducational public high schools in the Philadelphia School District can only do so if they attend a "comprehensive" school which is mainly for average students and which does not offer the curricular opportunities available in the two best schools.

B. Coeducation is the norm rather than the exception in modern schooling, considering the educational benefits derived from coeducation as opposed to single-sex schooling.

"More girls are sharing classrooms with boys, at all levels, in a growing number of coeducational schools all around the world." Greenough, *Coeducation As A World Trend,* 98 School and Society 2322, Jan. 1970, at p. 31. The "trend" to coeducation, so termed in the above article, has now become so much the norm that the court below [at 882] referred to single-sex schools as an "educational *alternative.*" [Emphasis added.] "Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity." *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975). Notably, with the exceptions of Central and Girls, and three comprehensive high schools, the school system is otherwise coeducational.

The phenomenon of coeducation has been accepted in American schooling with a "swiftness and intensity," to the extent that the switch-over from exclusively single-sex school systems to those with coeducation at their core has proceeded with a degree of "urgency." As stated in Radlo, *Boys and Girls Together* (?), 29 The Independent School Bulletin 2, Dec. 1969, at p. 12.

> "[I]t becomes apparent after observing these changes [from single-sex to coeducational schools] that those schools that have made the decision to accept the other sex on a totally equal basis are those that are achieving the greatest success. If in the classroom, in sports, in activities, in student government full parity is established, then a healthy climate is established." Lloyd, *An Apple For Coeducation,* 32 Loc, cit. 1, October 1972, p. 38.

This brief does not argue that single-sex schools be abolished, merely that where the school district has recognized coeducation as the norm and has seen fit to provide average students with the option of attending either coed or single-sex schools, the same option must be granted to the district's outstanding students.

II

Respondent school district's two single-sex, public academic high schools are in fact not equal in the areas of scientific facilities and monetary endowment.

The court below stated [at 885] that "[t]he finding of the district court discloses no inequality in opportunity for education between Central and Girls High Schools." This is a clear misstatement of fact, since the precise finding of the district court was: "With the exception of scientific facilities, in which Central is superior, the academic facilities of Central and Girls High are comparable." 400 F. Supp. 326, Finding of Fact No. 25, at 329 (1975).

The fact that Girls and Central are the only two academic high schools in the district may account for their being termed "comparable." Nevertheless, they do differ in quality of science facilities, and the petitioner member of the certified class of women complainants was the recipient of her junior high school's science award at the time she applied for admission to Central High School. Findings of Fact, Nos. 14 and 15, 400 F.Supp. at 328.

Ms. Vorchheimer, presently in her first year of college, has no plans at present to enter the scientific field. This

is not of crucial importance, however, since this suit is being brought on behalf of the class of all those similarly situated, and certainly among that class are female students who wish to study the sciences. For even as all outstanding students should enjoy the benefit of the best available science facilities, *a fortiori,* those outstanding students who choose science as a career goal must enjoy that opportunity.

The other area of inequality is that of financial endowment. "Central High is the only high school in Philadelphia with a substantial private endowment." 400 F.Supp. at 329. While there is "no evidence that as a result of this endowment Central's facilities, faculty or course of instruction is superior to Girls," *Id.,* if there were no value to the endowment it would have no reason for being.

Although the instant case deals with sex-based discrimination in public education, there is certainly a parallel to be drawn between the effects of a denial of equal protection for reasons of race and sex. This Court has said with reference to racial discrimination in public education:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown* v. *Bd. of Educ.,* 347 U.S. 483, 493 (1953).

This Court has also stated that it will be guided by "equitable principles" when implementing decisions which deal with the unconstitutionality of racial discrimination in public education. *Brown* v. *Bd. of Educ.,* 349 U.S. 294, 300 (1954). It has struck down such discrimination even where

the separate facilities were otherwise equal. *Id.* Surely equity, as well as constitutional principle, dictates that respondents' discrimination on the basis of sex against the otherwise-qualified student cannot stand.

III

There is no "fair and substantial relationship" between segregating outstanding high school students by gender and respondents' stated objective of providing educational options for students.

Since a majority of this Court has not as yet found sex to be a suspect classification, *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), the state is not required to prove a compelling interest in order to justify a classification based on sex. The Court has evidently moved, however, from the mere rational basis test to an "intermediate" or "strict rationality" standard of review when faced with such a classification. *Berkelman* v. *San Francisco Unified School Dist.,* 501 F.2d 1264 (9th Cir. 1974), which was decided in light of *Reed* v. *Reed,* 404 U.S. 71 (1971), required the state to prove with sufficient facts that its classification had a basis. And in *Stanton* v. *Stanton, supra* at 11, the Court "subjected the reasons offered to support the statute to a greater scrutiny" than mere rationality. 400 F. Supp. at 340. An intermediate standard of review appears to be in use, but its exact parameters have not been set forth. "The district court concluded, and I agree, that since *Reed* v. *Reed, supra,* the rational relationship test is regarded by a majority of the court as inapplicable to gender-based classifications." Dissenting opinion below, 532 F.2d 880, at 896.

Respondent school district stated that one of its objectives is to "provide 'educational options' to students." [Dissenting opinion, *supra,* citing respondents' brief.] Utilizing an intermediate standard against which to measure the constitutional acceptability of respondents' conduct, the Board's single-sex academic high school policy must be shown to advance the Board's stated objective. The Board's policy of assigning "a vast majority", *Id.,* of its students to coeducational schools, while denying this opportunity to academic students, flies in the face of its own objective to furnish its students with educational options. "[T]here is *no option* of a coeducational academic senior high school." *Id.,* emphasis added. There is no showing by the Board that separating outstanding academic students by gender bears a "fair and substantial relationship" to its own above-stated objective.

> "[I]f coeducation is detrimental to girls, all the public schools should be sex-segregated; if it is not, then there is no 'fair and substantial' relationship between sex-segregtation and the educational goals of School Board." 400 F.Supp. at 342.

In fact, Congressional policy as set forth in the Equal Educational Opportunities Act of 1974, §203, is that "maintenance of dual school systems in which students are assigned to schools solely on the basis of • • • sex • • • denies those students the equal protection of the laws guaranteed by the fourteenth amendment." 20 U.S.C. §1702 (a)(1). Thus, not only does the Board's conduct fail to advance its own stated policy, it also falls short of the standard for equal protection and contravenes the intent of a Congressional declaration.

Conclusion

For the reasons set forth herein, we respectfully submit that the decision of the court beow should be reversed.

Respectfully submitted,

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